89-347

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DAVID MCKIVITT WILLIAMS,

Petitioner,

v.

ALICE DVOSKIN and
JONAS RAPPEPORT, M.D.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DAVID MCKIVITT WILLIAMS
pro se
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QUESTIONS PRESENTED

1. Whether the Fourth Circuit improperly rejected the policy of *Forester* v. *White*, 484 U.S. ___ (1988) in ruling that state court-appointed investigators are immune from §§ 1983 and 1985 (3) damages, by virtue of derivative absolute judicial immunity, they having manipulated their investigation prior to reporting to the state court judge?

2. Whether the petitioner's First Amendment right to petition, and Fifth Amendment right to due process of law were denied when his pendent Maryland common-law claims were dismissed by applying the federal common law policy of judicial immunity to state common-law claims?

PARTIES BELOW

All parties in the proceedings below are as appear in the caption. The petitioner/plaintiff is represented *pro se*. The respondents/defendants are represented by J. Joseph Curran, Jr., Attorney General for the State of Maryland, and Julia Melville Freit, Assistant Attorney General for the State of Maryland. The petitioner, although appearing *pro se*, was admitted to practice before this Honorable Court on January 7, 1974.

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, decided on June 29, 1989, entered by mandate on July 20, 1989, and in support of his petition under Rule 17.1 (a) and (c) sets forth as follows:

OPINIONS BELOW

The opinion and order of the Court of Appeals and the District Court are not officially reported. They are reprinted in the Appendix at A1-A2 and A4-A16, respectfully.

The opinion of the District Court in the companion case of *Williams* v. *North*, is reported at 685 F. Supp. 502 (D. Md. 1988), and therefore is not reprinted herein.

The reported Maryland Court of Appeals case of *Knell* v. *Briscoe*, 49 Md. 414 (1878), holding that state court judges do not have absolute judicial immunity against claims for damages, is reprinted in the Appendix at A18-A26.

JURISDICTION

This action, filed pursuant to 42 U.S.C. §§ 1983 and 1985 (3) in the United States District Court for the District of Maryland, was finally dismissed on June 9, 1988. Following a timely appeal to the United States Court of Appeals for the Fourth Circuit the action of the District Court was affirmed on June 29, 1989, with the mandate issuing on July 20, 1989.

The jurisdiction of this Honorable Court to review the judgments of the Fourth Circuit is invoked under 28 U.S.C. § 1254 (1) and Rule 17.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment I:

> Congress shall make no law . . . abridging . . . the right . . to petition the Government for a redress of grievances. . .

U.S. Constitution, Amendment V:

> No person shall be . . . deprived of life, liberty, or property, without due process of law;. . .

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . .

42 U.S.C. § 1985(3)

> If two or more persons in any State or Territory conspire . . . for the purpose of depriving either directly or indirectly, any person or class of persons or the equal protection of the laws, or of equal privileges and immunities under the law . . . in any case of conspiracy set forth in this section, if one or more persons engage therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Maryland State Constitution, Article 24 of the Declaration of Rights:

> That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.

Maryland State Constitution, Article 46 of the Declaration of Rights:

> Equality of rights under the law shall not be abridged or denied because of sex.

STATEMENT OF THE CASE

On February 9, 1987, the petitioner filed this action in the United States District Court for the District of Maryland asserting claims of civil rights violations under 42 U.S.C. §§ 1983 and 1985 (3), and pendent Maryland common-law claims against court-appointed psychologist Alice Dvoksin and psychiatrist Jonas Rappeport, M.D. These claims, bottomed upon allegations of sexual discrimination, were met with timely motions to dismiss by the respondents, which the District Court granted as motions for summary judgment on June 10, 1988 (A4, A17). The District Court's dismissal was bottomed upon the policy that absolute judicial immunity is extended to state court-appointed persons who conduct investigations and appear to testify as witnesses for the court. As the District Court ruled the petitioner's complaint alleged a violation of a liberty or privacy interest under § 1983 (A6, A10), and alleged a gender-based conspiracy under § 1985(3) (A6, A13), only a skeletal factual recitation follows.

In 1978 the petitioner was awarded permanent custody of his daughter, then age 6, by a county court in Talbot County, Maryland. Child psychiatrists appointed by the custody judge at Sheppard Pratt Hospital in Baltimore

opined the petitioner was a fit and proper custodian for his daughter, and further opined the child's biological mother should not attempt to regain custody.

In 1982 the child's mother petitioned the custody court for a return of custody, or in the alternative to place custody of the child with a state agency, rather than the petitioner. At a hearing evidence surfaced that the county custody judge was having *ex parte* communications with the court-appointed attorney for the child, giving her instructions to take to the attorney for the child's mother, as to how to proceed with the ongoing evidentiary hearings. At the same time, evidence was produced by the petitioner, that the child's mother was engaging in various forms of sexual activity with the 14 year old son of the man she was engaged to marry, and smoking marijuana with her daughter, then age 10. The 14 year old boy was brought from Virginia to Maryland by his mother to testify to these matters that occurred when petitioner's child was visiting in Virginia. The child's mother, in contradiction to the 14 year old boy, denied giving marijuana to her daughter, and denied having oral sex with the 14 year old boy. The custody judge declared the 14 year old boy was not truthful, notwithstanding the mother of petitioner's child had previously been found unbelievable. The custody judge adjudicated the mother "amoral" because she confessed on the witness stand to having sexual intercourse with the 14 year old. Her child visitations were then restricted to take place only within Maryland. Petitioner's request that the mother contribute to her child's support was denied by the custody judge, notwithstanding she had the ability to do so. Custody remained with the petitioner.

In March of 1984, the child's mother married the father of the teenage boy she had been sexually involved with. In

August of 1984 the child's mother requested the petitioner to permit a visitation with her in Virginia. Petitioner agreed, provided the child was returned by September 7, 1984, for re-entry into her private day school which she had regularly attended for six years. The mother agreed but failed to return the child as promised. Instead, she had her attorney arrange an *ex parte* custody order hearing with the county custody judge. The county custody judge, in violation of court procedural rules, signed an *ex parte* custody order removing the custody from the petitioner and placing the child's custody with the mother.

The child was then entered in a public school in Virginia, after having attended Kent School in the custody of the petitioner with an average academic level and a perfect school attendance record for two years immediately prior. A subsequent investigation of petitioner's background by the Kent County Department of Social Services (KCDSS), conducted pursuant to order of the custody judge in October of 1984, revealed the child had been well cared for by the petitioner, that she had a healthy academic and social history in the custody of the petitioner, that she attended Sunday School regularly, and had many friends and close relatives in the petitioner's community.

Six weeks in the mother's custody in Virginia revealed the child was failing in every school subject and had more absences from school than she had in the previous six years while in the custody of the petitioner. It further surfaced that the child was living out of a camper on the back of a pick-up truck because the house the mother was building was incomplete. The sexually abused teenage boy was staying in the house with the mother and his father.

The petitioner filed an emergency petition with the custody court for the return of the child to his home and the re-entry of the child into the Kent School. The custody judge denied the petition, and over the petitioner's strong objection, granted the mother's oral telephone request that the child be committed to a mental institution for evaluation rather than returned to the petitioner. The child was admitted into maximum security in the Tidewater Psychiatric Institute near Virginia Beach, Virginia, without an evidentiary hearing to justify the commitment. After a one month commitment the custody judge scheduled a custody hearing at which time the mother's privately retained psychiatrist was permitted to testify, over the petitioner's objection, via a written report. The petitioner had no notice of this procedure and had no opportunity to cross-examine the mother's expert witness. The psychiatrist opined the child should not be permitted to live with the father if she didn't desire to. The child testified she would rather live with her mother than with the petitioner because it was easier living with her mother. The petitioner produced as his witnesses the court-appointed investigators from the KCDSS and members of the community which verified that the father had been a loving, moral, and fit parent and custodian of the child. At the end of the hearing the custody judge found as a fact that the child's mother was amoral. No finding of paternal unfitness was made. The custody judge then ruled that the child needed a new start in life and awarded custody to the KCDSS for placement in a foster home under the Maryland Foster Care Act. The custody judge also ordered that the child was to be re-entered into Kent School, which was the only school at which she had done well academically. The KCDSS was not a party to the litigation and was not seeking custody. It appeared at the hearing as a witness for the petitioner. The petitioner did

not appeal this ruling because under the Maryland Foster Care Act the child would be placed back into the petitioner's home as a primary placement.

Subsequently the petitioner learned the KCDSS was ignoring the court order and the child had not been returned to Maryland as ordered. Upon learning this the petitioner inquired of the KCDSS why it was not complying with the court order. A social worker for the KCDSS informed the petitioner the custody judge and his staff had been in telephone contact with the mother's psychiatric witness in Virginia and had decided to leave the child with the mother rather than return the child to Maryland. The petitioner filed a mandamus action in Kent County against the KCDSS seeking compliance with the custody order. The custody judge in Talbot County had an *ex parte* hearing with the KCDSS, and signed an *ex parte* order, rescinding the prior custody order providing for the return of the child to the KCDSS in Maryland. The petitioner appealed the *ex parte* order.

While this appeal was pending, a hearing was held on the mandamus action against the KCDSS in Kent County. Over the petitioner's objection, the Talbot County custody judge was assigned to hear the Kent County mandamus action. At a hearing on a motion to dismiss the mandamus action, petitioner requested the custody judge to recuse himself because he had secretly, and off the record, communicated with the KCDSS, verbally ordering that it not comply with the written order for the return of petitioner's child. Petitioner, in making his recusal suggestion, positioned that it was a violation of his right to due process of law under the Fourteenth Amendment to have the custody judge who had secretly ordered the KCDSS not comply with the order, to also determine any issue concerning the mandamus action against the

same social agency. In denying the petitioner's recusal suggestion and dismissing the mandamus action, the custody judge laughed at the petitioner, as he stated his conduct in his opinion was not un-American.

A state appellate court later reversed the secret *ex parte* order, expressly holding that the custody judge violated the petitioner's right to due process of law. Notwithstanding the reversal, the custody judge and the KCDSS continued to ignore the previous valid custody order by leaving the child in Virginia with the mother.

On July 22, 1985, petitioner filed an action in the United States District Court for Maryland asserting claims under 42 U.S.C. §§ 1983 and 1985 (3), and Maryland common-law claims against several county custody judges, the KCDSS and its employees, the municipalities for which the county judges acted, counsel for the mother, and the court-appointed counsel for the child. This related action is referred to in the District Court's opinion as *Williams* v. *North*, Civil Action No. K-85-3088 (A4, A5). That case was stayed on December 18, 1985, and except for the dismissal of the claims against the judges, remains stayed. See *Williams* v. *North*, 685 F. Supp. 502 (D. Md. 1988). These judges later retaliated by enlisting the mother's counsel to file an action for criminal contempt in state court against the petitioner for having sued the judges. Petitioner sought injunctive relief from the District Court in *Williams* v *North*, *supra*, relying upon *Garrison* v. *Louisiana*, 379 U.S. 64, 13 L.Ed 2d 125, 85 S.Ct. 209 (1964), and *WXYZ, Inc.* v. *Hand*, 658 F.2d 420 (6th Cir. 1981), which was denied. The criminal contempt petition remains pending in the state court forum.

In August of 1985, the county custody judge, over the objection of the petitioner, executed an order placing the

child in a boarding school in Pennsylvania and required the petitioner to pay for same. Entry testing revealed the activities of the child for the prior year had stunted her academic development to the extent she entered the 8th grade at a 3rd grade reading level.

The custody judge then ordered the petitioner to submit to a psychiatric evaluation by the respondents. The petitioner refused to be evaluated by the respondents, positioning the evaluation was a sham and an attempt to discredit the petitioner in *Williams* v. *North*, Civil Action No. K-85-3088. Notwithstanding this objection, petitioner offered to be evaluated by the doctors who had previously evaluated the parties at Sheppard Pratt Hospital in Baltimore. The custody judge rejected this proposal, and under threat of contempt, ordered the petitioner to be evaluated by the respondents.

Following the evaluation the respondents reported the results of their investigation to the county custody judge. It was recommended the custody of the child to be placed with the mother, that she remain in a boarding school, and that the petitioner have limited or no access to his daughter. Prior to appearing to testify in the state court proceeding to the results of their investigation, petitioner notified the respondents of gross distortions in the reported histories supplied by the petitioner and child's mother, and supplied the respondents with authenticated state court documents for verification of the asserted discrepancies. Among these documents was an authenticated copy of the state court transcript evidencing the mother had been adjudicated amoral for sexually molesting her stepson and smoking marijuana in the presence of petitioner's child. The respondents ignored the petitioner's request for correction. At the state court custody hearing on February 18, 1987, the county custody judge

passed a custody order in conformance with the respondent's recommendations. This order was subsequently reversed by a state appellate court.

On February 9, 1987, petitioner filed this action against the respondents. An amended complaint was filed on October 8, 1987. The amended complaint, *sub judice*, in addition to describing the misconduct of the respondents, contained allegations indentical to the amended compliant filed in *Williams* v. *North*, Civil Action No. K-85-3088, alleging among other things, the respondents had joined in an ongoing conspiracy with the county custody judges and others to interfere with petitioner's constitutionally guaranteed, and common-law right to privacy in rearing and educating his daughter. Petitioner also filed an amended complaint in *Williams* v. *North*, *supra*, describing the misconduct of the respondents and requested that the two cases be consolidated for trial.

On June 9, 1988, the District Court issued its memorandum and order dismissing petitioner's federal and state claims on grounds that the misconduct of the respondents was protected by absolute judicial immunity (A13-A16). Petitioner noted a timely appeal (A3) which was argued in the Fourth Circuit Court of Appeals on February 6, 1989. Prior to an affirmance of the District Court ruling by the Fourth Circuit court of Appeals on June 29, 1989 (A1-A2), petitioner apprised the Court of Appeals that a special committee appointed by the Maryland Court of Appeals had conducted an investigation of the Maryland court system and had reported that gender bias is extensive therein, as reported in Braase,*Gender Bias Extensive in Maryland Courts*, Md. Bar Bulletin, May 1989 at 1, and O'Neill & Czapanskiy, *Gender Bias Exists in Maryland Court System*, Vol. 22, No. 3 Md. Bar J. 38 (1989). The

mandate in this case issued on July 20, 1989.

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT IMPROPERLY REJECTED THE POLICY OF *FORRESTER* V. *WHITE*, 484 U.S. ____ (1988) IN RULING THAT STATE COURT-APPOINTED INVESTIGATORS ARE IMMUNE FROM §§ 1983 AND 1985 (3) DAMAGES, BY VIRTUE OF DERIVATIVE ABSOLUTE JUDICIAL IMMUNITY, THEY HAVING MANIPULATED THEIR INVESTIGATION PRIOR TO REPORTING TO THE STATE COURT JUDGE.

While this action was pending below, this Court established a new policy with respect to absolute judicial immunity which is in contravention with the policy now being implemented by the Fourth Circuit. *Forrester* v. *White*, 484 U.S. ____ 98 L.Ed.2d 555, 108 S.Ct. 538, (1988).[1] The petitioner argued below, to no avail, that the immunity policy implemented by the Fourth Circuit under *McCray* v. *Maryland*, 456 F.2d 1 (4th Cir. 1972), no longer is valid under federal common law in the shadow of *Forrester* v. *White*, *supra*. The respondents are only entitled to immunity under the federal common law which lawfully may be extended to them under the theory of derivative immunity for state court-appointees. As it is not possible for a state court judge to delegate his discretionary adjudication responsibilities to investigators, the respondents have no absolute immunity from damages for their extra-judicial activities under the policy now established by this Court in *Forrester* v. *White*, *supra*.

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[1] The case *sub judice* does not involve the issue of absolute witness immunity under *Briscoe* v. *Lahue*, 460 U.S. 325 (1983). The allegations of unconstitutional conduct against these court-appointed respondents deal mostly with their extra-judicial activities which occurred prior to their appearing to testify.

Petitioner alleged a cause of action under § 1983 (A6, A10, A13). Petitioner also alleged a conspiracy under § 1985 (3), (A6, A13). These respondents not only conspired together, they also conspired with the defendants in the companion case of *Williams* v. *North*, Civil Action No. K-85-3088, now stayed in the District Court. The allegations in *Williams* v. *North*, *supra*, also involve allegations of unconstitutional extra-judicial activities for which no immunity is available to these respondents. Persons who join in illegal conduct are jointly liable with the other conspirators for all the wrongs committed, notwithstanding they were not a party to the conspiracy originally. 15A C.J.S. *Conspiracy*, §§ 18, 19, pp. 653-660.

Plainly the Fourth Circuit has so far departed from the accepted and usual course of judicial proceedings, and has decided an important question of federal law in a way in conflict with decisions of this Court, as to call for an exercise of this Court's power of supervision. Rule 17.1(a) and (c).

II. THE PETITIONER'S FIRST AMENDMENT RIGHT TO PETITION, AND FIFTH AMENDMENT RIGHT TO DUE PROCESS OF LAW WERE DENIED WHEN HIS PENDENT MARYLAND COMMON-LAW CLAIMS WERE DISMISSED BY APPLYING THE FEDERAL COMMON LAW POLICY OF JUDICIAL IMMUNITY TO STATE COMMON LAW CLAIMS.

The right to petition for redress of grievances can be traced to June 15, 1215, when King John signed the Magna Carta at Runnymede, in the shadow of what is now known as Windsor Castle. Nowak, Rotunda, and Young, *Constitutional Law*, ch. 18 § XVI at 383 (1978). The right of access to the courts is but one aspect of the right to petition under the First Amendment. *California Trans-*

port v. *Trucking Unlimited*, 404 U.S. 508, 510, 30 L.Ed.2d 642, 646, 92 S.Ct. 609 (1972).

The District Court having obtained jurisdiction over the petitioner's federal claims, had the duty to adjudicate petitioner's pendent state-law claims. *Pennhurst State School & Hosp.* v. *Halderman*, 465 US 89, 117, 79 L.Ed.2d 67, 89, 104 S.Ct. 900 (1984).

Under *Erie R. Co.* v. *Tompkins*, 304 US 64, 82 L.Ed. 1188, 58 S.Ct. 817, 11 Ohio Ops 246, 114 ALR 1487 (1938), when a federal court exercises pendent jurisdiction over state common-law claims, it is constitutionally bound to apply state law. *See Erie*, *supra*, at 78-79, 82 L.Ed. 1188, 58 S.Ct. 817, 11 Ohio Ops, 114 ALR 1487. Failure to apply state law resulting in a dismissal violates the right to petition and is also a violation of due process of law as a denial of liberty or property under the fifth Amendment. *Simler* v. *Connor*, 372 U.S. 221, 9 L.Ed.2d 691, 83 S.Ct. 609 (1963). Only under circumstances involving the Eleventh Amendment, circumstances non-existent in the case *sub judice*, may the District Court apply federal common law to state common-law claims. *Boyle* v. *United Technologies Corp.*, 487 US, 101 L.Ed.2d 442, 108 S.Ct (1988).

Below, petitioner asserted several Maryland common-law claims. In the case *sub judice* and in the companion case of *Williams* v. *North*, *supra*, the common-law claims asserted were tortious interference with parental rights, *Hixon* v. *Buchberger*, 306 Md. 72, 567 A.2d 607 (1986); tortious abuse of process, *Berman* v. *Karvounis*, 308 Md. 259, 518 A.2d 726 (1987); a common-law tortious violation of Article 24 of the Maryland Declaration of Rights for having wrongfully interfered with the petitioner's right to rear and educate his child, *Widgeon* v. *Eastern Shore Hosp. Center*, 300 Md. 520, 479 A.2d 921 (1984): and a

common-law conspiracy to commit all of the above, *Daugherty* v. *Kessler*, 264 Md. 281, 286 A.2d 95 (1972).[2]

A careful reading of the District Court's memorandum (A-4, A-5), plainly reveals the petitioner's state common-law claims were dismissed by a wrongful application of federal common law as it pertains to judicial immunity.[3] Assuming, without conceding, the extra-judicial conduct of the respondents was cloaked with the immunity protecting Maryland judges, such was a qualified immunity rather than absolute immunity. *See Knell* v. *Briscoe*, 49 Md. 414 (1878), (A18-A26).

The Court of Appeals, by its affirmance of the District Court's decision, departed from accepted and the usual course of judicial proceedings. It decided an important question of federal law in a way in conflict with the decisions of this Court and calls for an exercise of this Court's power of supervision. Rule 17.1(a) and (c).

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[2] Under the common law of Maryland, the defense of absolute witness immunity only applies to tort actions couched in terms of defamation. *Keys* v. *Chrysler Credit Corp.*, 303 Md. 397 at 406, 494 A.2d 200 at 204 (1985). Under *Clea* v. *City of Baltimore*, 312 Md. 662, 679-685, 541 A.2d 1303, 1311-1314 (1988), a public official has no immunity for common-law tortious violations of rights protected by the Maryland Constitution.

[3] Even if it be argued the District Court did not dismiss the petitioner's state claims, by the claim preclusion policy applied by this Court, the Fourth Circuit and the Maryland Court of Appeals, petitioner cannot now re-file his claims in the common law courts of Maryland. *Migra* v. *Warren City School Dist. Bd. of Ed.*, 465 US 75, 79 L.Ed.2d 56, 104 S.Ct. 892 (1984) *Kutzik* v. *Young*, 730 F.2d 149 (4th Cir. 1984); *Beaver* v. *Bridwell*, 598 F. Supp. 90 (D. MD. 1984); and *Kent County Bd. of Educ.* v. *Bilbrough*, 309 Md. 487, 525 A.2d 232 (1987).

CONCLUSION

A writ of certiorari should be granted to review the judgment of the United States Court of Appeals for the Fourth Circuit. The Court should consider summary reversal.

Respectfully submitted,

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APPENDIX

APPENDIX
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-2570

DAVID MCKIVITT WILLIAMS,
Plaintiff-Appellant,

v.

ALICE DVOSKIN; JONAS RAPPEPORT, M.D.,
Defendants-Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Frank A. Kaufman, Senior District Judge. (CA-87-292-K)

Argued: February 6, 1989 Decided: June 29, 1989

Before RUSSELL, PHILLIPS, and SPROUSE, Circuit Judges.

David McKivitt Williams for Appellant. Julia Melville Freit, Assistant Attorney General (J. Joseph Curran, Jr., Attorney General on brief) for Appellees.

PER CURIAM:

Appellant, David M. Williams, a licensed attorney proceeding *pro se*, appeals from the district court's grant of summary judgment in favor of the appellees in his 42 U.S.C. § 1983

action. In his argument, appellant contended that appellants Rappeport and Dvoskin, court-appointed psychologists, conspired with a Maryland state court judge, his wife, and others to deprive him of his liberty interest in rearing his child. After a thorough review of the record and due consideration of the arguments set forth orally, we find this appeal to be without merit. Accordingly, we affirm on the reasoning of the district court. *Williams* v. *Rappeport and Dvoskin*, C/A No. K-87-292 (D.Md. June 9, 1988).[1]

AFFIRMED.

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[1] The appellees' motion for damages and double costs pursuant to Fed.R.App.P. 38 is denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL NO. K-87-292

DAVID MCKIVITT WILLIAMS

v.

JONAS R. RAPPEPORT, AND ALICE DVOSKIN,

ORDER FOR APPEAL

Mr. Clerk:

Please note an appeal to the United States Court of Appeals from the opinion and order dated June 9, 1988.

/s/David M. Williams

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1st day July, 1988 I mailed, postage prepaid a copy of the aforegoing to James J. Klair, Assistant Attorney General, Attorney General's Office, 7 North Calvert Street, 2nd Floor, Baltimore, Maryland 21202.

/s/David M. Williams

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL NO. K-87-292

DAVID MCKIVITT WILLIAMS

v.

JONAS R. RAPPEPORT AND ALICE DVOSKIN

Filed: June 9, 1988

Plaintiff, *Pro Se*, of Chestertown, Maryland.

J. Joseph Curran, Jr., Attorney General of Maryland, James G. Klair, Assistant Attorney General, and Julia M. Freit, Assistant Attorney General, of Baltimore, Maryland.

KAUFMAN, SENIOR DISTRICT JUDGE.

This case arises out of a hotly disputed state court custody battle between former spouses over their only child. Plaintiff David Williams brings this action against psychiatrist Jones Rappeport and psychologist Alice Dvoskin, in connection with their roles in that state court custody litigation, seeking damages and injunctive relief for alleged constitutional violations pursuant to 42 U.S.C. §§ 1983 and 1985, and for state claims pursuant to the doctrine of pendent jurisdiction. Williams contends that Drs. Rappeport and Dvoskin conspired with his former wife, Joan Turner, the state court judges involved in the custody case, *Turner* v. *Williams*, Equity No. 6206 (Circuit Court for Talbot County, Maryland), and others, to deprive him of custody of his daughter pursuant to a policy which discriminates against men in custody cases. Williams has sued those judges and others in two related cases pending in this court, *Williams* v. *Anderson*, Civil No. K-85-1646, and *Williams* v. *North*, Civil No. K-85-3088.[1]

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[1] Those two cases were stayed by Order of this court dated December 18, 1985 pending resolution of the underlying state custody proceeding. *See Williams* v. *North*, 638 F. Supp. 457, 463 (D. Md.

Williams was awarded custody of his daughter in March, 1978, in *Turner* v. *Williams*, *supra*, an action brought by Ms. Turner to obtain custody following the couple's divorce. During the daughter's visit with her mother in Virginia in September, 1984, Ms. Turner sought, and Judge John North, II issued, an *ex parte* order of the Circuit Court of Talbot County transferring custody of the child to her mother.

In August, 1985, after efforts by Williams to regain custody of the child, Judge North placed the child in a boarding school in Pennsylvania, and later ordered professional evaluations of both parents and of the child. The evaluations were to be conducted outside Talbot County because of the publicity associated with the custody battle and the high visibility of the parents. Judge North asked Dr. Rappeport, a psychiatrist, to conduct the examinations in his capacity as a private practitioner. Dr. Rappeport is also the director of the Medical Office of the Circuit Court for Baltimore City. Dr. Rappeport agreed to undertake the evaluations but, in view of Ms. Turner's financial status, suggested that the matter be handled through the Medical Office. Judge North agreed and issued an Order for Psychiatric and Psychological Treatment, dated February 26, 1986, referring the child and the parents to Dr. Rappeport and Dr. Dvoskin, a psychologist at the Medical Office. Dr. Dvoskin conducted the evaluations, obtained Dr. Rappeport's review and approval, and reported her findings to Judge North on May 6, 1986, apparently recommending that the child be placed in the mother's custody and sent to a boarding school. Both defendant doctors later testified to the contents of the evaluation report at a custody hearing before Judge North, who then determined to follow their recommendation.

1986). In *Williams* v. *North*, ____ F. Supp. ____ (D. Md. 1988), this court decided the issues involving the state court judges. Plaintiff's claims against the non-judge defendants in *Williams* v. *North*, Civil No. K-85-3088, and the two defendants in *Williams* v. *Anderson* remain subject to the stay and will be decided at a later date. Williams' claims against Drs. Rappeport and Dvoskin are all determined in this opinion.

This case centers on Williams' claim that "Dvoskin and Rappeport somehow reached an understanding and a meeting of the minds with Judge North . . . and Joan Turner to deprive the plaintiff of the custody of his child, the right to supervise, protect and care for his child, without due process of law and in violation of his right to equal treatment or equal protection of the law all bottomed upon sexual preference and bias against the male sex in favor of the female sex."[2] Williams also asserts violations of his rights under Maryland law, including his right to privacy and his right to be free of a conspiracy to deprive him of the custody of his child.

Drs. Rappeport and Dvoskin have moved to dismiss Williams' complaint on the grounds that (1) they did not act under color of state law; (2) Williams has not stated a claim for violation of any rights protected by section 1983; (3) Williams has failed to state a claim cognizable under section 1985(3); and (4) they are entitled to absolute immunity as judicial officers. In response to a request by this court, defendants filed affidavits of Judge North and Drs. Rappeport and Dvoskin. Williams, although given the opportunity, did not submit any further documents in form appropriate under Fed. R. Civ. P. 56. Since documents in addition to pleadings are included in the record in this case, defendants' motion to dismiss is treated as a motion for summary judgment pursuant to Fed. R. Civ. P. 12(b)(6) and 56. For the reasons discussed below, this court concludes that Williams has stated a cause of action under section 1983 and also section 1985(3), but may not prevail because the two defendant doctors are entitled to absolute immunity.

I. 1983 And Acting Under Color Of State Law

Williams, in order successfully to state a section 1983 claim, must establish that the defendants acted under color of state law and deprived Williams of a right secured by the federal Constitution or a federal statute. *See Parratt* v. *Taylor*, 451

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[2] Amended Complaint ¶ 59.

U.S. 527, 535-36 (1981), *overruled in part on other grounds*, *Daniels* v. *Williams*, 474 U.S. 327, 330-31 (1986). Defendants contend that, as court-appointed professionals, they were acting as an arm of the judiciary and therefore were not acting under color of state law.

A person acts under color of state law "only when exercising power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' " *Polk County* v. *Dodson*, 454 U.S. 312, 317-18 (1981) (quoting *United States* v. *Classic*, 313 U.S. 299, 326 (1941)) (footnote omitted). "The ultimate issue in determining if a person is subject to suit under § 1983 is whether the alleged infringement of federal rights is fairly atrributable to the state. . . . This is a fact-bound inquiry." *Calvert* v. *Sharp*, 748 F.2d 861, 862 (4th Cir. 1984), *cert. denied*, 471 U.S. 1132 (1985).

In *Calvert*, Judge Chapman concluded that a physician privately employed by a nonprofit professional corporation "employing numerous physicians and other health personnel," *id.* at 862, did not act under color of state law when he provided medical services to a prisoner in the Maryland penitentiary because the physician "had no supervisory or custodial functions," *id.* at 863, "owe[d] his ethical obligation and undivided loyalty to his patient," *id.*, and was not engaged in a function which traditionally had been the "exclusive prerogative of the state." *Id.* at 864. *But see Ort* v. *Pinchback*, 786 F.2d 1105, 1107 (11th Cir. 1986) (physician who contracted with the state to provide medical care to inmates was acting under color of state law, since "he took over the state's responsibility for attending to inmate medical needs").

When a professional, whether a public defender or a psychiatrist, is "not amenable to administrative direction in the same sense as other employees of the State," *Polk County*, 454 U.S. at 321, and when the professional-client relationship mirrors a similar relationship in private practice, state action is not involved. In *Polk County*, Justice Powell wrote that a public defender, though appointed by the state, as "a defense lawyer

is not, and by the nature of his function cannot be, the servant of an admnistrative superior." *Id.* The state could not interfere with the attorney's recognized duty to protect "the undivided interest of his client." *Id.* at 318-19 (quoting *Ferri* v. *Ackerman*, 444 U.S. 193, 204 (1979)). Further, the state itself has a duty to "respect the professional independence of the public defenders whom it engages." *Id.* at 321-22 (footnote omitted). In *Jackson* v. *Salon*, 614 F.2d 15 (1st Cir. 1980), then Chief Judge Coffin wrote "that court-appointed counsel works primarily for the benefit of his indigent client and only indirectly for the benefit of the state or society in general, and in this relationship counsel is controlled by the wishes of his client and his independent professional judgment while he is in no significant way controlled by the state to which his client's interests are legally adverse." *Id.* at 17.

Neither Dr. Rappeport nor Dr. Dvoskin owed an independent obligation to Willams or possessed freedom from state control. Dr. Rappeport himself notes in his affidavit that his evaluations of Williams, the child, and the mother were conducted by a public office, *i.e.*, the Medical Office of the Circuit Court for Baltimore City. Both Dr. Rappeport and Dr. Dvoskin performed their duties as public employees, not as private practitioners, and were paid by the Medical Office for the services they rendered. Additionally, both professionals regarded their primary duty as running to the court and not to Williams, the mother, or the child. That conclusion is buttressed by Judge North's order, which required the parties to "execute all necessary releases so the aforesaid doctors can evaluate and report to the court without hinderance of doctor/client privilege."[3] The substance of the interviews and analyses by both doctors ultimately was disclosed in court. Accordingly, since Drs. Rappeport and Dvoskin were public employees appointed by the court to assist Judge North, saw their responsibility running to the court and owed no ethical duty to protect

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[3] Order for Psychiatric and Psychological Evaluations (February 27, 1986). Exhibit to Complaint.

the interests of any individual, both defendants acted under color of state law.[4]

II. 1983 And The Violation Of Federal Constitutional Or Statutory Rights

Defendants also contend that the record lacks factual support for a claim that defendants deprived Williams of any rights or interests secured by the Federal Constitution or any law of the United States. Williams, 37-page Amended Complaint is replete with allegations and claims but none is cogently pleaded. Williams does appear, however, to have stated one colorable substantive due process claim. Count Five of the Amended Complaint, titled "Violation of Civil Rights," seems to assert that defendants deprived Williams of his liberty interest in rearing his child.

The Constitution imposes limitations on government action with respect to certain private family decisions, such as those relating to contraception, *Griswold* v. *Connecticut*, 381

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[4] *Hall* v. *Quillen*, 631 F.2d 1154 (4th Cir. 1980), *cert. denied*, 454 U.S. 1141 (1982), upon which defendants rely, is not to the contrary. In *Sumpter* v. *Harper*, 683 F.2d 106 (4th Cir. 1982), Judge Bryan noted that *Hall* stands for the proposition that "a physician, even when acting under court appointment, does not do so 'under color of state law' by merely practicing medicine . . . where the only link is a State license to practice." *Id.* at 108. The physician in *Hall* apparently was a private psychiatrist appointed by the court to evaluate the plaintiff in connection with his commitment to a state hospital. In this case, the defendants are employed by a public agency. Other cases citing *Hall* also involve physicians who did not work for a public agency and who did not appear to perform evaluations for the court as a normal part of their practice, as does the medical office for which Drs. Rappeport and Dvoskin work. *See, e.g.*, *Anderson* v. *Glismann*, 577 F. Supp. 1506, 1508-09 (D. Colo. 1984); *but see Plain* v. *Flicker*, 645 F. Supp. 898 (D.N.J. 1986), where a private New Jersey physician's certification of commitment of the plaintiff to a state hospital—made pursuant to a state statute requiring certification by a licensed physician—was considered a state function subjecting the physician to a § 1983 action.

U.S.479 (1965), sending one's children to religious or public school, *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), and guiding the development of and retaining the custody and companionship of the child, *Lassiter* v. *Dep't of Social Services*, 452 U.S. 18 (1981). When a state seeks to affect the relationship of parent and child in furtherance of a legitimate state interest, a fundamental constitutional right is implicated. *See, e.g., Santosky* v. *Kramer*, 455 U.S. 745 (1982) (termination of the rights of parents with respect to their natural children); *Little* v. *Streater*, 452 U.S. 1 (1981) (determining paternity); *Stanley* v. *Illinois*, 405 U.S. 645 (1972) (determining whether an unwed father may retain custody of his children after their mother's death); *Trujillo* v. *Board of County Commissioners of the County of Santa Fe*, 768 F.2d 1186 (10th Cir. 1985) (mother and daughter could bring a § 1983 action arising out of the death of their son and brother on the basis that the mother and sister had an interest in continued intimate association with their son and brother); *Kelson* v. *City of Springfield*, 767 F.2d 651, 653-54 (9th Cir. 1985) (parents possess a constitutionally protected liberty interest in continued association with their children). While the outer boundaries of the right to rear one's child are not clear, particularly when a parent's rights have not been completely terminated, Williams has alleged a violation of a liberty interest sufficient to withstand defendants' pending motion.

III. 1985(3)

Although Williams has not specified the subsection of section 1985 under when he sues, his claims arguably implicate section 1985(3) because he asserts that Drs. Rappeport and Dvoskin conspired with each other and with Judges North and Rasin, and Joan Turner to deprive him of custody of his daughter. Section 1985(3) states in relevant part:

> If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immu-

> nities under the laws . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

For conduct to be actionable under section 1985(3) "there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal employment of rights secured by the law to all." *Griffin* v. *Breckenridge*, 403 U.S. 88, 102 (1971) (footnotes omitted).

Defendants contend that Williams has not alleged the class-based discrimination necessary to state a valid § 1985(3) claim. But, once again, while the contours of Williams' claims are vague, a liberal reading of his complaint supports a conspiracy claim based on sex discrimination. Williams alleges that "it is the official policy of the Judges and Courts of the Second Judicial Circuit . . . to foster and promote sexual preference in custody cases . . . in favor of the female sex and amounts to a state or a government enforcement of a sexually discriminating policy."[5]

Further, plaintiff's allegations tie both defendants to the alleged conspiracy by claiming that Drs. "Dvoskin and Rappeport somehow reached an understanding and a meeting of the minds with Judge North, Judge Rasin, and Joan Turner, to deprive the plaintiff of the custody of his child."[6]

Whether conspiracies motivated by sex discrimination are actionable under section 1985(3) has not been addressed by the Supreme Court or the Fourth Circuit. However, the Third and

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[5] Amended Complaint ¶ 58.

[6] Amended Complaint ¶ 59.

Fifth Circuits have concluded that sex discrimination is within the reach of section 1985(3). In *Novotny* v. *Great American Federal Savings and Loan Ass'n*, 584 F.2d 1235 (3rd Cir. 1978), *vacated on other grounds*, 442 U.S. 366 (1979), Judge Adams wrote:

> The principle that individuals should not be discriminated against on the basis of traits for which they bear no responsibility makes discrimination against individuals on the basis of immutable characteristics repugnant to our system. The fact that a person bears no responsibility for gender, combined with the pervasive discrimination practiced against women, and the emerging rejection of sexual stereotyping as incompatible with our ideals of equality convince us that whatever the outer boundaries of the concept, an animus directed against women includes the elements of a "class-based invidiously discriminatory" motivation.

Id. at 1243 (footnotes omitted). Although Judge Adam's decision in *Novotny* was vacated on other grounds, subsequent Third Circuit cases have treated his holding regarding section 1985(3) as good law.[7] *See, e.g., C & K Coal Co.* v. *United Mine Workers*, 704 F.2d 690, 700 (3rd Cir. 1983); *Skadegaard* v. *Farrell*, 578 F. Supp. 1209, 1218-19 (D.N.J. 1984). *See also Conroy* v. *Conroy*, 575 F.2d 175, 177 (8th Cir. 1978); *Tufts* v. *Bishop*, 551 F. Supp. 1048, 1050 (D.Kan. 1982). The Fourth Circuit has also intimated—but not held—that sex-based discrimination is actionable under section 1985(3). In *Buschi* v. *Kirven*, 775 F.2d 1240 (4th Cir. 1985), Judge Russell wrote:

> To meet the requirement of a class-based discriminatory animus, under this section the class must possess the "discrete, insular and immutable characteristics comparable to those characterizing classes such as race, national origin, and sex."

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[7] In his dissent in *Great American Savings & Loan Ass'n* v. *Novotny*, 442 U.S. 366 (1975), Justice White noted that the Third Circuit had correctly assumed that section 1985(3) is applicable to sex discrimination. 442 U.S. at 389 n.6.

Id. at 1257 (quoting *Bellamy* v. *Mason's Stores, Inc.*, 368 F. Supp. 1025, 1028 (E.D. Va. 1973), *aff'd*, 508 F.2d 504 (4th Cir. 1974)). *See also Life Insurance Co. of North America* v. *Reichardt*, 591 F.2d 499, 505 (9th Cir. 1979) (women purchasers of insurance meet the § 1985(3) class requirement).

Accordingly, Williams, alleging a gender-based conspiracy, has stated a cognizable claim under section 1985(3).

IV. Immunity

Although Williams' complaint does state a cause of action under both sections 1983 and 1985(3), the complaint cannot withstand defendants' assertion of absolute quasi-judicial immunity.

A judge is entitled to absolute immunity from suits for damages unless he acted "in the 'clear absence of jurisdiction.'" *Stump* v. *Sparkman*, 435 U.S. 349, 356-57 (1978) (quoting *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335, 351 (1872)). In *McCray* v. *Maryland*, 456 F.2d 1 (4th Cir. 1972), Judge Sobeloff wrote that absolute judicial immunity

> is matchless in its protection of judicial power. . . . The rule is tolerated . . . only because it is recognized that judicial officers in whom discretion is entrusted must be able to exercise discretion vigorously and effectively, without apprehension that they will be subjected to burdensome and vexatious litigation.

Id. at 3. *See also Williams* v. *North*, ____ F. Supp. ____, ____ (D. Md. 1988), and cases cited therein.

Quasi-judicial officers also have been accorded absolute immunity under certain circumstances. *See Arebaugh* v. *Dalton*, 600 F. Supp. 1345, 1349 (E.D. Va. 1985) (state governor performed judicial function in extradition process); *Ashbrook* v. *Hoffman*, 617 F.2d 474 (7th Cir. 1980) (commissioners appointed by court to conduct a partition sale of property held entitled to quasi-judicial absolute immunity); *Walden* v. *Wishengrad*, 745 F.2d 149 (2d Cir. 1984) (attorney for Department of Social Services who initiated and prosecuted child protective

orders granted immunity). In *Walden*, the Second Circuit wrote:

> We recognize that absolute immunity should be accorded only in exceptional cases. . . . The rationale underlying the need for absolute immunity must be closely scrutinized before the Court will hold that a government official is protected from liability by an impenetrable shield.

Id. at 152 (citations omitted).

The determination of whether absolute immunity should be extended rests on an analysis of "functional categories, not on the status of the defendant." *Briscoe* v. *La Hue*, 460 U.S. 325, 342 (1983). In *McCray* v. *Maryland*, the Fourth Circuit concluded that a state court clerk sued for his alleged negligence in connection with the filing of a state post-conviction relief petition, was not entitled to absolute quasi-judicial immunity. In so holding, Judge Sobeloff wrote:

> [I]n determining whether the protection afforded by the doctrine of absolute immunity is to be expanded to lesser judicial personnel, it is imperative always to bear in mind the reasons underlying the creation of the immunity shield. "The proper approach is to consider the precise function at issue, and to determine whether the officer is likely to be unduly inhibited in the performance of that function by the threat of liability for tortious conduct." *Carter* v. *Carlson*, *supra*, 447 F.2d [358] at 362 [(D.C. Cir. 1971), *rev'd on other grounds*, 409 U.S. 418 (1973)] (Bazelon, C.J.) . . .
>
> The immunity of "quasi-judicial" officers such as prosecuting attorneys and parole board members derives, not from their formal association with the judicial process, but from the fact that they exercise a discretion similar to that exercised by judges. Like judges, they require the insulation of absolute immunity to assure the courageous exercise of their discretionary duties. Where an official is not called upon to exercise judicial or quasi-judicial discretion, courts have properly refused to extend to him the protection of absolute judicial immunity, regardless of any apparent relationship of his role to the judicial system. For

> example, a defense counsel, a court stenographer, and a jailer all have important duties in the judicial process, but none is afforded judicial immunity because none exercises judicial or quasi-judicial discretion which requires the protection of absolute judicial immunity.

456 F.2d at 3-4 (footnotes omitted).

Professionals appointed by a judge to assist the judge in evaluating individuals involved in a lawsuit before the court do perform discretionary functions within the judicial process. For example, in *Meyers* v. *Morris*, 810 F.2d 1437 (8th Cir.), *cert. denied*, 108 S. Ct. 97 (1987), absolute immunity was accorded to "therapists" and others "appointed to fulfill quasi-judicial responsibilities under court direction," including duties relating to the question of whether certain children had been neglected. *Id.* at 1467. In so doing, Judge Ross wrote: "The absolute immunity which is accorded persons acting as an integral part of the judicial process protects them from having to litigate the manner in which they performed their delegated functions." *Id.* Freeing court-appointed therapists from liability in such instances "protects important public interests. . . . Psychologists and other experts would be reluctant to accept court appointments if they thereby opened themselves to liability for their actions in this official capacity." *Doe* v. *Hennepin County*, 623 F. Supp. 982, 986 (D. Minn. 1985). Accordingly, court-appointed doctors are generally entitled to the same immunity extended to judges. *See Burkes* v. *Callion*, 433 F.2d 318, 319 (9th Cir. 1970), *cert. denied*, 403 U.S. 908 (1971). *See also Bartlett* v. *Weimer*, 268 F.2d 860, 862 (7th Cir. 1959), *cert. denied*, 361 U.S. 938 (1960); *Phillips* v. *Singletary*, 350 F. Supp. 297, 300 (D.S.C. 1972); *Bartlett* v. *Duty*, 174 F. Supp. 94, 97-98 (N.D. Ohio 1959).

Drs. Rappeport and Dvoskin and Judge North, the presiding judge in the state court custody proceedings, have stated in affidavits that Judge North issued an order referring Williams, Joan Turner and their daughter to defendants for an evaluation and report to assist Judge North in deciding the custody issues. Williams has not challenged those affidavits. Nor has

Williams submitted or proferred any evidence to suggest that defendants were not acting at all times pursuant to such court order. Accordingly, Drs. Rappeport and Dvoskin are entitled to the protection of absolute immunity and the grant of summary judgment.

V. Injunctive Relief

Plaintiff has requested that "defendants be permanently enjoined from violating citizens' civil rights available under 42 U.S.C. § 1983 and § 1985."[8] While Williams correctly argues that immunity does not extend to a claim for injunctive relief, *Pulliam* v. *Allen*, 466 U.S. 522, 541-42 (1984), in order to be entitled to such relief, a plaintiff must establish that "he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 101-02 (1983) (citations omitted). While "past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury," *O'Shea* v. *Littleton*, 414 U.S. 488, 496 (1974), "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *Id.* at 495-96. In this case, the role of the two defendant doctors concluded when they testified in the custody proceedings in which they were involved before Judge North. Accordingly, injunctive relief may not be appropriately granted in this case.

VI. Conclusion

For the reasons stated in this opinion this Court will enter an order granting summary judgment to defendants Rappeport and Dvorskin.

/s/_____
Senior United States District Judge

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[8] Amended Complaint ¶ 76.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL NO. K-87-292

DAVID MCKIVITT WILLIAMS

v.

JONAS R. RAPPEPORT, AND ALICE DVOSKIN

ORDER

For the reasons stated in an opinion filed today in this case, judgments are hereby entered for defendants.

The Clerk is directed to mail copies of this Order and of the said opinion to plaintiff and to counsel of record.

It is so ORDERED this 9th day of June, 1988.

/s/_____
Senior United States District Judge

ANDREW KNELL and Benjamin B. Knell *v.*
ALEXANDER M. BRISCOE.

Decided June 28th, 1878.

MALICIOUS RENDITION OF JUDGMENT BY JUSTICE OF THE PEACE; ACTION FOR—; RELEVANCY AND SUFFICIENCY OF EVIDENCE. LANDLORD AND TENANT; DISPOSSESSION OF TENANT HOLDING OVER. APPEAL BONDS; WHEN AMOUNT IS IN JUDICIAL DISCRETION.

A justice of the peace or any other judicial officer is liable in damages at the suit of the party injured, for malicious, fraudulent and cor[415]rupt conduct in *the discharge of his judicial duties; but not for error of judgment, or mistake honestly made.[a]

pp. 416, 417

The plaintiffs sued the defendant, a justice of the peace of the City of Baltimore, to recover damages for acting maliciously, fraudulently and corruptly in rendering a certain judgment against the plaintiffs, and in refusing to receive and approve an appeal bond in the case in the penalty of $200, and in demanding a bond in the penalty of $800. At the trial one of the plaintiffs testified that in a conversation he had with the defendant more than a year before the transaction in question, the latter in speaking of some bond in another case which witness refused to sign, said to him, "I will get even with you, and you know I can," and from that time he and the defendant had not been on friendly terms, nor had witness ever had any business with the defendant since, until the trial of this case. In what character of case the bond spoken of was to have been given, or in what precise connection this expression was used, did not clearly appear. *Held:*

That the court below was right in refusing to allow such an expression used so long before to be used by the jury as

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[a] *Cf. Bevard* v. *Hoffman*, 18 Md. 479, note (a); *State* v. *Carrick*, 70 Md. 588.

evidence of a malicious threat or design on the part of the defendant to act corruptly or fraudulently in rendering the judgment complained of.

p. 419

The amount of the penalty of an appeal bond in a proceeding to dispossess a tenant holding over in the City of Baltimore has not been prescribed by statute, and the fixing of that penalty and the approval of the sureties offered are judicial and not ministerial acts.[b]

pp. 420, 421

The *legal sufficiency* of testimony is a question of law for the court.[c]

p. 422

Where an inquiry turns upon intention and motive, and where fraud, corruption and the like constitute the gist of the action, any fact, however slight, if at all relevant to the issue, is admissible.[d]

p. 422

Whenever the testimony adduced by a plaintiff is so light and inconclusive that no rational, well constructed mind can infer from it the fact which it is offered to establish, it is the duty of the court, when applied to for that purpose, to instruct the jury

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[b] *Cf. Baltimore* v. *Baltimore County*, 19 Md. 564. As to the dispossession of the tenant, see Code, Art. 53, sec. 5, see also *Clark* v. *Vannort*, 78 Md. 216; *Roth* v. *State*, 89 Md. 524.

[c] *Cf. Cropper* v. *Pittman*, 13 Md. 191, note (b). And the admissibility of evidence is to be determined before its weight is considered; *Cunningham* v. *Dwyer*, 23 Md. 229. The *sufficiency* of evidence cannot arise upon the question of its admissibility, but must be presented by prayers; *Neighbors* v. *Maulsby*, 41 Md. 482.

[d] *Cf. Cursti* v. *Moore*, 20 Md. 96, notes (a) and (b).

that there is no evidence before them to warrant their finding the fact thus attempted to be proved.[e]

p. 422

Appeal from the Superior Court of Baltimore City.

The case is stated in the opinion of the court.

Exception.—At the close of the plaintiff's evidence, the court (Dobbin, J.,) required the defendant to submit the following prayer:

[416] *I. The defendant prays the court to instruct the jury that there is no evidence legally sufficient to entitle the plaintiffs to recover.

This prayer was granted by the court. The plaintiffs excepted.

The jury rendered a verdict for the defendant and judgment was entered accordingly. The plaintiffs appealed.

The cause was argued before Bartol, C. J., Grason, Miller, Alvey and Robinson, JJ.

William Reynolds, for the appellants.

John Q. A. Jones, for the appellee.

Miller, J., delivered the opinion of the court.

The appellants sued the appellee, a justice of the peace for the City of Baltimore, to recover damages for acting "maliciously, fraudulently and corruptly, and with the willful and corrupt desire to injure and oppress the plaintiffs, and in conscious, willful and flagrant disregard of his duties as such justice of the peace," in rendering a certain judgment against the plaintiffs, and in refusing to receive and approve an appeal bond in the case in the penalty of $200, and in demanding a bond in the penalty of $800. The defendant pleaded not guilty, and at

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[e] *Cf. Brady* v. *Consol. Coal Co.*, 85 Md. 641.

the trial, after the evidence on the part of the plaintiffs was closed, the court required the defendant's counsel to submit, and granted, an instruction to the jury that there is no evidence legally sufficient to entitle the plaintiffs to recover. To this ruling the plaintiffs excepted, and this was the only exception taken in the case.

It is well settled that a justice of the peace, or any other judicial officer, is liable in damages at the suit of the party injured for malicious, fraudulent and corrupt conduct in the discharge of his judicial duties, but not error of *judgment or mis[417]take honestly made. *Bevard* v. *Hoffman*, 18 Md. 479; *Friend* v. *Hamill*, 34 Md. 304. In this case it appears that the plaintiffs on the 16th of June, 1876, had rented a carpenter's shop in the City of Baltimore, from Lanahan and Bradley, which the lessors afterwards on the 12th of September , 1876, assigned to one Cowan. On the 19th of October, 1876, a notice signed by Lanahan, Bradley and Cowan was served on the plaintiffs to quit at the end of the following month of their tenancy.

This notice appears to have been miscarried for some reason, and on the 14th of December, 1876, another notice signed by Cowan only was served on them to quit the premises at the end of the month of their tenancy, which should expire next after thirty days from the date thereof. The plaintiffs having refused to obey this notice, a summons was issued against them on the 20th of January, 1877, by the defendant as a justice of the peace, at the suit of Cowan, reciting this notice and requiring them to appear before him on the 26th of January, 1877, and show cause why restitution of the premises should not be forthwith delivered to Cowan. This summons was in due form and was issued under the Code of Public Local Laws, Art. 4, sec. 890, which gives to a single justice in the City of Baltimore jurisdiction in such cases. On the day named the Knells appeared before the justice and he by consent of parties postponed the case until the next day, Saturday, the 27th of January, 1877. On that day *and after trial had* the justice awarded judgment in favor of Cowan for restitution of the premises, and that the defendants,

the Knells, pay one cent damages and $19.27 costs, and on the same day issued a warrant of restitution upon this judgment directed to the sheriff of Baltimore City, under which the sheriff on the following Monday put Cowan in possession of the premises. On the 6th of April, 1877, the Knells took an appeal without bond from this judgment *to the City Court, where it was reversed and [418] judgment entered for the appellants on the 23rd of May following.

This was the action of the justice, and now what evidence is there that he acted fraudulently and corruptly in rendering this judgment? He undoubtedly held the opinion which was entertained by these landlords when they gave the notices, and has been entertained by others and mooted elsewhere than before justices of the peace, that in all cases of renting of tenements in Baltimore City for a definite term, where the rent is payable monthly, the tenancy may be ended at any time by a month's notice, and that in such cases the payment of rent and not the length of time for which the premises were rented governs in this particular. In this he may have been mistaken, but surely the holding of that opinion is no evidence of fraudulent or corrupt conduct. His refusal to receive evidence that the plaintiffs had rented the shop for a term of one year from the 15th of June, 1876, at seventy dollars, and had paid ten dollars in advance for insurance on the premises, and that the balance was payable monthly at five dollars per month, and his refusal to receive it after his attention had been called to the letter of the plaintiff's counsel, in which it was stated that the Knells were yearly and not monthly tenants, and authorities referred to in support of that position, merely shows persistence in his own opinion in opposition to that of an attorney at law, and shows nothing else. The testimony of Lanahan that he signed the first notice because the defendant said to him "you will have to sign it because it will be necessary to get Knell out," shows nothing more than that he then thought the signatures of Lanahan and Bradley, the original lessors, were necessary to the effectiveness of the notice which Cowan wished to send. The object of the notice was to get the Knells out, and it was

probably prepared in his office or he was consulted about it, and the advice given is similar to that usually given by magistrates, [419] when they *are called upon to prepare papers necessary to judicial action or to act upon them. There is not a particle of proof that the defendant instigated this proceeding for the eviction of the plaintiffs, or interfered in the matter in any way whatever, until he was called upon by the landlord to act in his official character. The witness Benjamin K. Knell testified that in a conversation he had with the defendant in January, 1876, the latter, in speaking of some bond in another case which witness refused to sign, said to him, "I will get even with you, and you know I can," and that from that time he and the defendant had not been on friendly terms, nor had witness ever had any business with the defendant since, until the trial of this case. In what character of case the bond spoken of was to have been given or in what precise connection this expression was used does not clearly appear, and we are of opinion the court was quite right in refusing to allow such an expression, used more than a year before these transactions, to be used by the jury as evidence of a malicious threat or design on the part of the defendant to act corruptly or fraudulently in rendering this judgment. Besides, the same witness on cross-examination admitted that he went to the defendant's office on the 20th of November, 1876, to see about the first notice to quit, and while there he had asked the defendant whether he could appeal from a judgment, which another magistrate had rendered against him a few days before, and defendant told him he could appeal. This not only shows an entire absence of malice, on the part of the defendant towards the witness, but a friendly disposition to aid him, by giving the information and advice he needed.

We must now consider the testimony in relation to the penalty of the appeal bond. It appears that after the judgment was rendered, the plaintiffs said they wished to appeal, and the defendant thereupon said they must give a bond in the sum of $800, and offered to accept Andrew *Knell, Sr., who was [420] then present, as surety, but he declined to go on a bond for so large an amount. Witness then assured the defendant it would

be impossible for him to give such a bond, and after going away and consulting his counsel, came back and told him his counsel said the bond demanded was excessive, and that one in the penalty of from $150 to $200 would be ample, that defendant then turned to a member of the bar who was in his office, and had acted as counsel for Cowan at the trial, and said, "how is that?" and the attorney in reply made a remark, at which they both laughed. We have not given the exact language used, but the amount of it is that Cowan's attorney made a jocular but not disrespectful expression as to the law stated by Knell's counsel, which caused merriment. The defendant then showed witness sec. 5, of Art. 53, of the Code, and witness insisted his case was not like the one there referred to, but the defendant refused to accept a bond for less than $800, and persisted in this refusal after witness had filled up and offered to execute a bond in the penalty of $200. In the section of the Code referred to by the justice the penalty of the bond there required is not less than $800. He was mistaken in supposing this provision was applicable to the case before him, but as we have said in reference to his opinion upon another question, his mistaken opinion, however much persisted in, is not to be regarded as evidence either of malice, fraud, or corruption. It has been argued that in fixing the penalty of the appeal bond he had to perform a ministerial duty only, and that the law gave him no discretion in the matter, and he is therefore liable to the extent of actual damage without proof of malice or corruption. But the Acts of Assembly and sections of the Code referred to in support of this position do not sustain it. The amount of the penalty of an appeal bond in a case like this has not been prescribed by statute, and the fixing of that penalty and the ap[421]proval of the sureties offered are clearly judicial *and not ministerial acts. It was also proved by the same witness, Knell, that after the eviction of the plaintiffs under this judgment, he met the defendant one day in the street in front of his office, asked him why he had decided another case against him when there was no evidence for the plaintiff and he had testified in his own behalf, and that defendant thereupon told witness he would not believe him, that he was a perjurer, and asked him to step into his office, but

witness declined to do so. But the plaintiffs themselves gave by another witness the defendant's version of this matter, and this witness says the defendant told him he had a conversation with Knell about a case he had decided against him since the eviction, in which Knell used *abusive language*, and he said he wished Knell's remarks had been made in his office, for if they had been he would have placed him where he would not have been very easily released, and kept him there as long as possible. This was offered by the plaintiffs themselves, and it shows that Knell used abusive language to the justice, and the latter expressed his regret that it had not been used in his office, so that the speaker could have been punished therefor, and the testimony of Knell himself shows that when he asked the justice an improper question as to his decision of a case before him, in which Knell had been a witness for himself, the justice expressed in very plain terms his opinion of the questioner's truthfulness and veracity.

We have now referred to and noticed all the testimony in the cause bearing upon the question raised by the exception, and we are well satisfied a jury could not have found from it that the defendant was guilty of corrupt, fraudulent and malicious disregard of duty in rendering this judgment or in fixing the penalty of the appeal bond, without indulging in wild conjecture or loose speculation. The court was, therefore, right in instructing them that there was no evidence in the case *legally sufficient* to entitle *the plaintiffs to recover. In reach[422]ing this conclusion we have not disregarded or been unmindful of the well established principle so earnestly pressed upon our attention by the appellants' counsel, that in all cases where the inquiry turns upon intention and motive, and where fraud, corruption and the like constitute the gist of the action, any fact, however slight, if at all relevent to the issue, is admissible in evidence. But the question here is not as to the admissibility, but the *legal sufficiency* of the testimony offered, and that is a question of law for the court in this as in other cases. In other words, to use again the language of the court in *Cole* v. *Hebb*, 7 G. & J. 29, so often cited, "wherever the testimony adduced by

a plaintiff is so light and inconclusive that no rational, well-constructed mind can infer from it the fact which it is offered to establish, it is the duty of the court, when applied to for that purpose, to instruct the jury that there is no evidence before them to warrant their finding the fact thus attempted to be proved." Such in our opinion is the character of the evidence adduced by the plaintiffs in this action, and it follows that the judgment appealed from must be affirmed.

Judgment affirmed.